We have no new rule from these three cases but we do have in one of them a square decision on a disputed question and one from which, in looking forward, we may well inquire how far the Federal Supreme Court will go in future cases involving state court interpretation of state law.

M. S. B.

REVIVING BARRED DEBT AS A FRAUDULENT "INCUMBRANCE" UNDER THE BANKRUPTCY ACT

A recent federal decision holds that the revival by an insolvent debtor just before bankruptcy of a debt barred by the statute of limitations may be treated as an "incumbrance" of the debtor's property, and void as such under section 67e of the Bankruptcy Act. *In re Salmon* (1916, S. D. N. Y.) 239 Fed. 413.[1] In its ordinary meaning, "incumbrance of property" denotes some charge or lien attaching to specific property. To refer to a simple unsecured debt as an incumbrance of property causes considerable linguistic strain. Moreover, under the familiar *ejusdem generis* rule of construction, the term "incumbrances," in conjunction with its accompanying words in section 67e—"all conveyances, transfers, assignments, or incumbrances of his property"—would naturally be confined to the narrower and more usual meaning above suggested. Furthermore, the purpose of section 67e is to invalidate only such transfers as would have been fraudulent at common law or would constitute an act of bankruptcy under section 3 of the Act.[2] The learned judge says that the destruction by the bankrupt of a valid defense against the claimant's debt is analogous to a voluntary conveyance in fraud of creditors. But at common law a transfer of property was not fraudulent as to creditors when the debtor was under a moral obligation to the transferee, though the obligation was legally unenforceable because of some statutory provision.[3] The payment of a barred debt was not deemed a badge of fradu-

[1] For more complete statement of facts, see page 129, *infra*.

[2] *Coder v. Arts* (1908) 213 U. S. 223, 242; 29 Sup. Ct. 436, 444.

[3] Bump, *Fraudulent Conv.* (3d ed.) 223; *Del Valle v. Hyland* (1894, N. Y. Sup. Ct.) 76 Hun. 493 (outlawed debt); *Livermore v. Northrop* (1870) 44 N. Y. 107 (debt within Statute of Frauds); *Wilson v. Russell* (1858) 13 Md. 494 (debt discharged under insolvent laws); *Gardner v. Rowe* (1825, Eng. V. C.) 2 Sim. & St. 346 (transfer to *cestui* of land held on oral trust).

lent intent but a satisfaction of the debtor's moral obligation to pay a creditor, for the statute of limitations is usually considered as merely suspending the creditor's remedy, not as destroying the debtor's obligation.[4] When the statute is waived, the old obligation again becomes effective.[5] The running of the statute creates in the debtor the power of defeating the claim, if he cares to exercise it. This power passes to the trustee in bankruptcy, and cannot, after bankruptcy proceedings have been instituted, be exercised by the debtor.[6] But apart from bankruptcy, the privilege of exercising the power by pleading the statute is personal to the debtor and he is under no duty to exercise it for the benefit of other creditors.[7] Consequently it would seem to follow that creditors cannot object to his releasing or destroying the power by a new promise, actual or implied from part payment. If sound policy forbids the revival of barred debts within four months of bankruptcy, it is believed that further legislation is necessary. The part payment of a barred debt might (as well as reviving the debt) constitute a preference, voidable under section 60b, if the debtor were charged with notice;[8] but it is difficult to see how such a revival can be avoided as a fraudulent incumbrance under sec. 67e. The only other cases found on the point are opposed to the principal case, and would seem to represent the sounder view.[9]

M. B.

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[4] *Johnson v. Albany & S. R. R. Co.* (1873) 54 N. Y. 416.

[5] *Ilsley v. Jewett* (1841, Mass.) 3 Met. 439.

[6] *In re Zorn & Co.* (1912, E. D. Pa.) 193 Fed. 299.

[7] *Elliot v. Trahern* (1891) 35 W. Va. 634, 643, 14 S. E. 223, 226; see also *Cahill v. Bigelow* (1836, Mass.) 18 Pick. 369, 372 (Statute of Frauds).

[8] See *In re Banks* (1913, N. D. N. Y.) 207 Fed. 662.

[9] *In re Banks, supra; In re Blankenship* (1915, S. D. Cal.) 220 Fed. 395.